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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 494

CHARLES HENRY TURPIN, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Petition for a Writ of Certiorari

OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES & RULES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING WRIT	7
ARGUMENT I	7
II	8
III	10
CONCLUSION	11

Table of Cases

Abercombie v. *State*, 36 SO 2d 111	10
Bollenbach v. *United States of America*, 326 U.S. 607, 90 L.ed. 350	10
Bram v. *United States of America*, 168 U.S. 532, 42 L.ed. 568	8
Goldsmith v. *United States of America*, 107 U.S. App. D.C. 305, 277 F.2d 335	9
Jackson v. *United States of America*, 106 U.S. App. D.C. 396, 273 F.2d 521	9
Mallory v. *United States*, 354 U.S. 449, 1 L.ed. 1479	7
McNabb v. *United States of America*, 318 U.S. 332, 87 L.ed. 819	7
Opper v. *United States of America*, 348 U.S. 84, 99 L.ed. 101	8
Smith v. *States*, 147 G. 689, 95 S.E. 281	10
State v. *Fowler*, 108 S.E. 2d 892	10
State v. *Goode*, 249 N.E. 632, 107 S.E. 2d 70	10
State v. *Wilcox*, 204 N.W. 369	10
Trilling v. *United States of America*, 104 U.S. App. D.C. 159, 260 F.2d 677	9
Upshaw v. *United States of America*, 335 U.S. 410, 93 L.ed. 100	7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

Charles Henry Turpin, Jr., petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 14, 1960.

OPINIONS BELOW

There was no opinion rendered in the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals ren-

dered July 14, 1960, is not yet reported but is contained in the certified transcript of record submitted herewith and appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia was dated and entered July 14, 1960. On September 19, 1960 rehearing was denied.

The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code, and Rule 37 b. of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. When an accused is arrested in the District of Columbia for homicide at 12:15 P.M. on a week-day, and taken to a nearby police precinct where he is detained without arraignment, for the sole purpose of interrogating him and obtaining evidence from him and is subjected to intensive, uninterrupted interrogation for over five hours—without food, although he requests it—are incriminating statements finally obtained from him at 5:45 P.M. admissible into evidence against him in a subsequent criminal trial in the United States District Court for the District of Columbia?

2. Where the above circumstances exist, and where after a detention of over ten hours the police finally take the accused before a committing magistrate where he is arraigned at 11 P.M. without benefit of counsel, and then immediately thereafter is taken to a cell block adjacent to the courtroom where the police arrange for him to be confronted by the widow of the deceased and to have incriminating conversation with her in their presence, does such process constitute an evasion of Rule 5(a) of the Federal Rules of Civil Procedure, and render the incriminating statements made by accused inadmissible against him in a subsequent criminal trial in the United States District Court for the District of Columbia?

3. In a prosecution for homicide where self-defense was raised and where the evidence showed that at the time the accused shot the deceased the latter did not in fact have the gun that the accused believed he possessed, and the jury specifically requested that the Court: "Redefine or clarify the terms self-defense, excessive force and the significance of the defendant's frame of mind at the time of the commission of the crime in connection with self-defense and excessive force," was it not reversible error for the trial court to instruct the jury that the defense of self-defense depends not only upon the sufficiency of circumstances to justify the fears of a reasonable man that he is about to be attacked, but also upon the existence of an actual attack or real danger of such an attack?

STATUTES AND RULES INVOLVED

Rule 5(a)(b) Federal Rules of Criminal Procedure:

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before another nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Rule 30 Federal Rules of Criminal Procedure

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

In Criminal Action No. 802-59, Charles Henry Turpin was charged in a single count indictment with first-degree murder. The case came on for trial on December 9, 1959; and on December 17, 1959 the jury returned a verdict of guilty of manslaughter. Subsequently, the petitioner was sentenced under the Youth Correction Act, and the judgment and commitment filed.

It is from this verdict and judgment that petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. On July 14, 1960 the judgment was affirmed, and on September 19, 1960 petitions for rehearing were denied.

The relevant facts are as follows:

At about midnight on August 13, 1959, one Luther Buckson was shot on the street in the 4800 block of Alabama Avenue, S.E., and shortly after removal to D. C. General Hospital he died. Cause of death was attributed to gun shot wounds from a .22 caliber firearm.

Petitioner was arrested as a suspect at about 12:10 P.M. on Friday, August 14, 1959 at Benning Road and East Capitol Street, N.E., and taken directly to Number 14 Police Precinct—two blocks away—arriving there at about 12:20 (J.A. 26). Pefitioner was taken to the detectives' room, and from 12:20 or 12:30 P.M. until 5:45 P.M., was interrogated about the shooting by at least one, and sometimes more than one officer, before he made an incriminating statement at 5:46 P.M. The interrogation was continuous and uninterrupted for this entire period. At about 5:30 P.M. petitioner asked for food, but was told none was available. Sixteen minutes later, after talking to his wife, who had been brought to the precinct, after being in police custody since about 11:00 A.M., petitioner made oral admissions (J.A. 33-44). Petitioner was arraigned at 11:00 P.M. in Municipal Court.

Police officers were on hand at the near-midnight arraignment with the wife of the dead man—who could serve no

legal purpose in this proceeding. Immediately after petitioner was committed to the custody of the marshal the officers took Mrs. Buckson back into the cell-block in which he was being held pending his transfer to the District of Columbia jail where he repeated to her some of his prior admissions.

As trial commenced, at a bench conference prior to the opening statements counsel for appellant objected to even the mention of the defendant's extra-judicial statements by the prosecutor in his opening statement, but the objection was overruled. At the same time the court gave an advance ruling on the admissibility of the statements made to Mrs. Buckson which was adverse to petitioner, and allowed the prosecutor to relate them in his opening statement. (Petition for Rehearing, App. B) Subsequently, testimony was admitted as to all admissions over petitioner's objections.

Evidence developed that on the fateful night the deceased was at an upstairs window when he observed some young men near his automobile which was parked on the street. At the time the deceased, then clad only in a pair of undershorts, rushed out into the street and fired a single shot from his .32 caliber pistol at the young men who were then running away. The testimony shows, and the prosecution concedes, that petitioner was not among the youngsters who were at the car but had joined them a few seconds later while they were walking away from the automobile (J.A. 15). The evidence is clear that petitioner had no knowledge of any wrong-doing on the part of anyone. However, when the deceased shot at the entire group petitioner ran for his life along with the rest of them. At the time petitioner had in his possession a pistol which he was transporting from the apartment which he and his wife occupied to his parents' home about ¾ of a mile away where he and his 8-month pregnant wife were staying temporarily. After running quite some distance petitioner decided to resume his way home. While walking through the apartment development, and at a point a block away from the spot at which they had been shot at, the deceased, now fully clothed,

jumped from the shadows of a parked car and threatened to kill petitioner if he moved. According to the evidence, petitioner, believing that the man still had his pistol and would shoot, pulled his own gun and fired several shots as he ran away from the deceased, upon whom no gun was found.

After several hours of deliberation the jury in a note requested that the Court ". . . redefine or clarify the terms self-defense, excessive force and the significance of the defendant's frame of mind at the time of the commission of the crime in connection with self-defense and excessive force." In complying with the request the court emphasized as a prerequisite to resorting to self-defense the existence of a *real* danger or *actual* necessity, and at no time mentioned that "apparent necessity" might justify self-defense measures. When asked to give a complete and accurate instruction within the framework of the jury's request, the Court refused (J.A. 59-61).

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted in this case under subdivision 1(b) of Rule 19 of this Court because the United States Court of Appeals for the District of Columbia Circuit has rendered a decision which is in conflict with applicable decisions of this Court; and, in addition, raises an important question in the administration of federal criminal justice.

ARGUMENT I

The Court in *McNabb* v. *United States*, 318 U.S. 332, 63 S. Ct. 608 87 L. ed. 819; *Upshaw* v. *United States*, 335 U.S. 410, 93 L. ed. 100, and *Mallory* v. *United States*, 354 U.S. 449, 1 L. ed. 2d 1479 stated, reiterated and finally clarified the law as it relates to the admissibility of statements obtained from accused persons during periods of illegal detention in violation of Rule 5(a). The facts of this case fall squarely within the prohibitions enunciated in these cases. The lower court admitted the pre-arraignment statements on the basis that they were not obtained during a period

of unnecessary delay, but at no time referred to them as anything other than confessions. (JA 41)

The Circuit Court of Appeals condoned their admissibility on the ground that they were exculpatory. In every instance in which this Court has treated such extra-judicial admissions it has rejected the contention that exculpatory material contained in the statements put them beyond the reach of the law applicable to such admissions. For example, in *McNabb, supra*, which dealt with Rule 5, the statements of the McNabb brothers were completely exculpatory, i.e., they were there but they had nothing to do with the shooting and did not encourage the third McNabb boy to shoot. Thus, by inference this Court disregarded the exculpatory character of the statement as a relevant factor in determining admissibility.

Where the question of the voluntary character of a confession was in issue, this Court was presented with this exact proposition in *Bram* v. *United States*, 168 U.S. 532, 42 L. ed. 568, and there the Court stated that the exculpatory matter in the accused's statement had no relevance in determining its admissibility, pointing out that if the statement is not considered as an admission or confession, it has no place in the trial, since it is clearly inadmissible on any other ground.

Finally, in *Opper* v. *United States*, 348 U.S. 84, 99 L. ed. 101, 75 S. Ct. 158, where this Court was dealing with the role of the extra-judicial admission from another point of view, it was presented with the argument that the exculpatory character of the statement excluded it from the applicable rule. But this Court made the general pronouncement that exculpatory statements may not differ from other admissions of incriminating facts. Thus it seems clear that the holding and the reasons of the court below are both in conflict with decisions of this Court.

ARGUMENT II

Petitioner asserts that the statements made to the widow of the deceased immediately after his appearance before

the committing magistrate while in the presence of and under the ostensible control of the officers who were his original interrogators, are no less inadmissible than those made before his appearance at the Municipal Court. Since this Court's decision in *Mallory, supra*, the practice has been developed by the police in the District of Columbia to make elaborate preparation for the continued custody and control of accused persons by the police after they have obtained illegal confessions and presented such confessions to the committing magistrate who relies upon them as a basis for his order of commitment. This continued custody is devoted to the purpose of eliciting from the accused utterances and/or behavior which are consistent with the already illegally obtained confession. *Trilling* v. *United States*, 104 U.S. App. D.C. 159, 260 Fed. 2d 677; *Jackson* v. *United States*, 106 U.S. App. D.C. 396, 273 Fed. 2d 521; *Goldsmith* v. *United States*, 107 U.S. App. D.C. 305, 277 Fed. 2d 375, and now the instant case. Such statements are inextricably tied in with the pre-arraignment illegal statements, and since they are procured during a period in which the atmosphere is unchanged it can fairly be stated that they are part and parcel of the original illegal evidence. Such procedures are clearly devices of evasion which, if allowed to prevail, will effectively thwart this Court's purposes in applying the *McNabb* rule. Specifically, instead of serving notice on federal officers that they shall not engage in illegal procedures with the hope of reaping benefits therefrom in a federal prosecution, approval of these devices raises the clear danger that police officers will willfully and consciously disobey the law in the hope, and indeed almost the assurance, that the accused who has been detained for a long period of time will shortly after his arraignment, while saddled with a fresh confession, and before the spell is broken, make some utterance which will tend to incriminate him.

In *Trilling, supra*, and in *Jackson, supra*, the Circuit Court of Appeals invalidated convictions which were predicated upon such post-arraignment incriminating evidence.

But in *Goldsmith, supra,* and in the instant case, the convictions were allowed to stand.

It is submitted that the decisions of the Circuit Court of Appeals for the District of Columbia appropos this question present such a pattern of inconsistency and unpredictability as to offer local police officers a virtual inducement to violate Rule 5.

ARGUMENT III

"It is universally recognized that one is not punishable criminally for taking the life of another person when he has been put under the necessity or apparent necessity of doing so without any fault on his own part in order to protect himself from the peril of death or serious bodily harm at the hands of the person whose life he took. . . . The right of self-defense is founded upon necessity, real or apparent." 26 Am. Jur. Homicide § 125, p. 241. The instruction complained of here made the right of self-defense depend both upon a real necessity to kill *and* upon the sufficiency of the circumstances to justify the fears of a reasonable man that it was necessary for him to kill the deceased in order to save his own life. By the use of the conjunctive "and" instead of the dis-junctive "or" the trial court confused the two principles of the law of justifiable homicide, and its instruction was calculated to lead the jury to conclude that before they could acquit the accused on the ground of self-defense it would be necessary to find that the killing was done on account of both actual necessity to kill *and* under the fear of a reasonable man that at the time he was in serious danger which made it necessary for him to kill. Not only does the giving of such an instruction constitute error, *Smith* v. *State*, 147 Ga. 689, 95 SE 281; *State* v. *Goode*, 249 N.C. 632, 107 SE 2d 70; *Apprecombe* v. *State*, 367 2d, 111; *State* v. *Fowler*, 108 SE 2d 892; *State* v. *Wilcox*, 204, NW 369, but it also raises such an important question in the administration of federal criminal justice as to warrant the granting of this writ. Cf. *Bollenbach* v. *United States of America*, 326 U.S. 607, 90 L. ed. 351.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the Court of Appeals of the District of Columbia, should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15661

CHARLES HENRY TURPIN, JR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Decided July 14, 1960

Mr. William B. Bryant for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* Appellant age 19 was indicted for first degree murder. He was convicted of manslaughter and sentenced under the Federal Youth Corrections Act. Three grounds are urged for reversal.

Appellant claims that two statements made by him and received in evidence against him were inadmissible under

the *Mallory* Rule.[1] The first statement was made to the police prior to the preliminary hearing before a committing magistrate. The second statement was made to the victim's widow in the presence of police officers, shortly after the preliminary hearing.

Shortly after 9:35 p.m. on the day of the homicide, the deceased looked out the window of his home and saw someone apparently tampering with his car or near his car. Dressed only in his underwear he went out of the house, approached the car, and fired a shot in the air. Appellant and several others ran off. One of the members of this group testified as a witness and said that on that day he had gone with two friends to the scene of the homicide for the purpose, among other things, of getting some "fender skirts" from automobiles. This witness had a criminal record for stealing and stripping automobiles. They met appellant near that point and noticed he had a gun in his belt, which he showed to them. The witness, who was among the group which fled after the deceased fired a shot in the air, said that about 5 minutes later they heard about 4 additional gun shots. Another witness fixed the additional shots at 5 shots. In the interval between the time the boys ran away and the time of the fatal shooting the deceased had returned to his apartment, dressed, and then came back to the street. When he was later found dead, no weapons of any kind were found on his person or nearby.

Appellant was arrested at or about 12 or 12:30 p.m. and questioned by the police. He made no statement as to the shooting. About 3 p.m. he said he would tell his version of the shooting if he could first talk with his wife. Although police tried promptly to find her, she was not located until about 7:15 p.m. Upon talking with his wife, appellant made an exculpatory statement to the police which incorporated his later claim of self defense. Some hours later, he was

[1] Mallory v. United States, 354 U.S. 449 (1957). At the trial defense counsel disclaimed reliance on the *Mallory* case urging that Trilling v. United States, 104 U.S.App.D.C. 159, 260 F.2d 677 (1958), required the evidence to be rejected.

taken before a Municipal Court Judge and, after being charged, was advised as to his right to counsel and to remain silent.

The circumstances surrounding his second statement were that when appellant left the preliminary hearing and was still in the courthouse, he was confronted by the victim's widow and at once said to her: "Mrs. Buckson, I am sorry I shot your husband. I am sorry. . . . I didn't intend for it to be that way. . . . I thought he still had the gun, so I shot him. . . . I don't know how many shots I fired; I just turned in [*sic*] loose. . . . I am sorry that things turned out the way they did. . . . But your husband shot first."

The questions raised by the admission of the statements made to the police and the later statement made to the victim's widow must be viewed in the light of the defense. The appellant contends that to admit the statements made to the widow at a time when he was emotionally upset and distraught violates the prohibitions implicit in the *Mallory* case, *supra*, *Jackson* v. *United States*, 106 U.S.App.D.C. 396, 273 F.2d 521 (1959), and *Trilling* v. *United States*, 104 U.S.App.D.C. 159, 260 F.2d 677 (1958). He contends that, in all events, a post preliminary hearing utterance cannot be received in evidence unless it is made at a time after the accused has had a chance to reflect and deliberate. Yet in his opening statement to the jury, before any evidence was introduced by the government, appellant's counsel advised the jury of his claim of self defense. While this statement of counsel was, of course, not evidence, and constituted no admission, it was nevertheless consistent with appellant's original statement to the police and his spontaneous utterances to the victim's widow—uttered shortly after he received the judicial warning at the preliminary hearing. Those statements of appellant told the jury nothing more than appellant's opening statement at the trial told them, namely, that appellant shot the deceased in self defense. Indeed, the very nature of the statements showed that from the moment of the shooting appellant consistently claimed this theory.

It is argued that absent the statements the prosecution had a "weak" case. But it should be noted that witnesses placed him on the scene of the shooting with a gun in his belt, that he fled with the admitted culprits, and that the gun was found in his home and was identified as the gun which killed the deceased. This is hardly a "weak" case and, in all the circumstances, the election to plead self-defense was not only sound but was supported by the spontaneous utterances of appellant suggesting that the self defense theory was one sincerely urged by him. On this record it would be incredible to allow the defendant one trial to "try out" the self defense theory and another to explore perhaps a different one. The statements now complained of were cumulative. *Cf. Starr* v. *United States*, 105 U.S.App.D.C. 91, 264 F.2d 377 (1958), *cert. denied*, 359 U.S. 936 (1959). Moreover they were consistent with, if not essential to and in aid of, his defense.

That the jury gave some credence to appellant's theory is suggested to a degree by the return of the lesser included offense of manslaughter in circumstances where he might well have been convicted of first degree murder. If all the statements explaining the homicide had been believed, the jury might well have returned a verdict of not guilty.

Appellant's contentions concerning the second statement made to the victim's widow after he had received a judicial warning are in part answered by *United States* v. *Bayer*, 331, U.S. 532, 541, (1947), holding that the making of a presumably inadmissible statement does not perpetually disable an accused from thereafter making a usable confession. However, the nature of appellant's statements was such that they do not come within the orbit of the type of statement dealth with in *Bayer*. See also *Goldsmith* v. *United States*,—— U.S.App.D.C.——, 277 F.2d 335 (1960); *Guy* v. *United States*, 71 App.D.C. 89, 107 F.2d 288, *cert. denied*, 308 U.S. 618 (1939).

Appellant next urges that when the jury asked for a map of the neighborhood in which the homicide occurred, which had not been offered in evidence by either side, appellant's

counsel, out of the presence of the jury, objected. The court thereupon advised the jury that such a map, not having been offered by either of the parties, could not be made available without the consent of both counsel and that one counsel was unwilling to consent. The court specifically told the jury that it would not be proper for the court to advise them which counsel had withheld consent. On this record it is difficult to see how the jury could have assumed that it was the appellant's counsel who had objected, or that this information, if known to the jury, prejudiced appellant. No objection was made by the appellant at the time and no record was made that defense counsel then considered that the jury had overheard any of the bench conference.

Finally, the appellant objects to the court's supplementary charge on his defense when the jury asked for additional instructions on that score. We have examined both the original and the supplementary charge and find no error in either.

Affirmed.

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CHARLES HENRY TURPIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	7
Conclusion	13

CITATIONS

Cases:

Acers v. *United States*, 164 U.S. 388	12
Addington v. *United States*, 165 U.S. 184	12
Agnew v. *United States*, 165 U.S. 36	12
Albizu v. *United States*, 88 F. 2d 138, certiorari denied *sub nom. Campos* v. *United States*, 301 U.S. 707	12
Apel v. *United States*, 247 F. 2d 277	12
Goldsmith v. *United States*, 277 F. 2d 335, No. 68 Misc., O.T. 1960, certiorari denied, October 17, 1960	8, 11
Haines v. *United States*, 188 F. 2d 546, certiorari denied, 342 U.S. 888	10
Jackson v. *United States*, 48 App. D.C. 272	12
Jackson v. *United States*, 273 F. 2d 521	11
Mallory v. *United States*, 354 U.S. 449	8
Metoyer v. *United States*, 250 F. 2d 30	8
Morse v. *United States*, 256 F. 280	9
Patterson v. *United States*, 192 F. 2d 631, certiorari denied, 343 U.S. 951	12
Perry v. *United States*, 253 F. 2d 337, certiorari denied, 356 U.S. 941	9

Cases—Continued

	Page
Spring Co. v. *Edgar*, 99 U.S. 645	12
Trilling v. *United States*, 260 F. 2d 677	11
United States v. *Bayer*, 331 U.S. 532	11
United States v. *Leviton*, 193 F. 2d 848, certiorari denied, 343 U.S. 946	9
United States v. *Mitchell*, 322 U.S. 65	9
Williams v. *United States*, 273 F. 2d 781	8

Statute and Rules:

Youth Corrections Act:	
18 U.S.C. 5010	2
18 U.S.C. 5017	2
Federal Rules of Criminal Procedure, Rule 5(b)	10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 13–17) is reported at 281 F. 2d 637.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1960. A petition for rehearing and/or rehearing *en banc* was denied on September 19, 1960. The petition for a writ of certiorari was filed on October 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was error in the admission into evidence of statements, made by petitioner before and

after arraignment, that he shot the deceased in self defense.

2. Whether the supplementary instructions given at the request of the jury were erroneous.

STATEMENT

Petitioner was charged in a one count indictment with murder in the first degree of Luther Buckson (Pet. 5). Following a trial by jury in the United States District Court for the District of Columbia, petitioner was convicted of manslaughter,[1] and was committed under the Youth Corrections Act (18 U.S.C. 5010(b)) (Pet. 5) to the custody of the Attorney General.[2] The Court of Appeals affirmed the conviction (Pet. 13–17).

The pertinent facts are as follows:

1. THE CIRCUMSTANCES OF THE CRIME

Before midnight on August 12, 1959, the deceased, looking out of the window of his home, saw someone at his car (J.A. 7). He ran out in his undershorts, fired a shot, came back to his apartment, and called the police (J.A. 7–8, 18). At the time the deceased fired this shot, petitioner was with three companions[3] whom he had met shortly before (J.A. 17–18). Peti-

[1] The trial court held that the government failed to prove first degree murder and the matter was submitted to the jury on the questions of second degree murder and manslaughter (J.A. 46).

[2] Under that Act such commitment, which is "for treatment and supervision" (18 U.S.C. 5010), cannot exceed four years (18 U.S.C. 5017).

[3] The others had previously decided to attempt to steal some fender skirts (J.A. 16–17).

tioner had a gun (J.A. 18). The four, including petitioner, ran away (J.A. 18–19).

After coming back to the apartment, the deceased dressed and left without his gun (J.A. 8, 9). He was found about midnight with several bullet wounds in the right side of his chest (J.A. 21–25). A .22 caliber gun and nine empty cartridges in a waste basket were found in petitioner's apartment in a search conducted under a warrant about 4:30 p.m. on August 14, 1959 (J.A. 4–5).[4]

2. PETITIONER'S STATEMENTS

(a) Early in the trial the government called the widow of the deceased (J.A. 6–14). She testified that she had seen petitioner on August 14, 1959, at Municipal Court (J.A. 10–11, 32).[5] It was stipulated that this was approximately one-half hour after petitioner's preliminary hearing (at about 11 p.m. on August 14), while petitioner was still in the cell-block at Municipal Court (J.A. 11). At that time petitioner told Mrs. Buckson that he was sorry he had shot the deceased (J.A. 13). He said that he had shot because he was afraid, but that he had not intended to do so (J.A. 13–14, 32–33). Lieutenant Daily of the Homicide Squad, who was also present when the statement was made, corroborated it (J.A. 31–33).

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[4] This was after the arrest of petitioner but before he made the statements at issue in this case.

[5] At a bench conference following the impanelling of the jury, government counsel told the court that it was his understanding that petitioner had asked to see the widow (Pet. for Rehearing, App. B-2).

Petitioner objected to testimony about this statement, on the ground that it resulted from a previous illegal detention (J.A. 12, 32).[6] The court held that the statement was admissible because it was made after preliminary hearing to a person not a police officer (J.A. 12, 32).

(b) Officer Benjamin Chaplin testified that on the day of the arrest (at about 12:10 p.m. on August 14, 1959) he had talked with petitioner from 1:45 or 2:00 p.m. until 5:45 p.m. (J.A. 34).[7] At about 3:00 p.m. petitioner told Chaplin that if he could talk to his wife he would tell what had happened (J.A. 34). The police were not able to locate petitioner's wife until 5:15 p.m., at which time she arrived at the police station and talked with petitioner (J.A. 39). At approximately 5:45 p.m. petitioner made an oral statement about the events of the previous night and said that he had shot the deceased because he believed the deceased was still carrying a gun (J.A. 43). Petitioner was arraigned about 11 p.m. that night. The district court permitted the officer to testify about the oral statement on the ground that there had been no unnecessary delay between the arrest and the statement (J.A. 42–43).

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[6] Petitioner earlier had objected to reference to either statement in the opening statement of the government, but the court held that the government could refer to the statements (Pet. for Rehearing, App. B. 1–3).

[7] At the time Chaplin entered the room in which he talked with petitioner, other officers were questioning him (J.A. 38). At least one other officer questioned petitioner during the interval between 2:00 and 5:45 (J.A. 39).

Petitioner told the police that shortly before the shooting he had gone to the apartment which he and his wife usually shared to pick up a pistol which his wife had asked him to bring to her at the home of petitioner's parents, where petitioner and his wife were staying temporarily. Petitioner placed the pistol in his belt and started walking to his parents' home (J.A. 42). En route he came upon the three friends with whom he stopped to talk, and he showed them the gun. While they were standing near the automobile of the deceased, the deceased came out of his apartment in his undershorts and fired a shot (J.A. 42–43). Petitioner and his companions ran for about two blocks, after which petitioner continued on his way. Near the place at which the deceased had fired the earlier shot, the deceased, then fully clothed, jumped from behind a parked car, saying to petitioner "Come here. Don't run or I'll shoot" (J.A. 43). Petitioner thereupon pulled the pistol from his belt and fired several shots at the deceased (J.A. 43).

3. THE CHARGE

After the jury began its deliberations, it sent a note to the trial judge asking that he "redefine or clarify the terms self-defense, excessive force and the significance of the defendant's frame of mind at the time of the commission of the crime in connection with self-defense and excessive force" (J.A. 59). The court gave the following instructions (J.A. 59–60):

> * * * First, self-defense: if a person is being attacked or in real danger of being attacked,

seriously attacked, then he has a right to protect himself. That is self-defense. That is fundamental. Preservation is the first law of nature. But he must be in real danger. He must be actually attacked or in real danger of being attaacked, and he must have a reasonable ground to believe that he is about to be attacked. And also, that he has no other way of protecting himself except by taking the step that he has taken. That is self-defense. It is limited, however, to the rule that one may not use excessive force. That means this: a person who is in a position of exercising his right of self-defense has no right to go any further than is necessary for his own safety. If he can protect himself without killing his attacker, why, he may not kill his attacker. If killing his attacker is the only reasonable way of protecting himself, then, of course, he has a right to kill him. But if he can protect himself by not going as far, then his right of self-defense does not go as far as to kill his attacker. Or, as in this case, even if it was reasonably necessary to use a firearm, if he could protect himself by firing one shot, he cannot fire any more.

Now, it is for the jury to consider what was reasonable to do under the circumstances, but a person in exercising his right of self-defense is not permitted to go any farther than is reasonably necessary to protect himself.

Now, the significance of the defendant's frame of mind at the time of the commission of the crime in connection with self-defense and excessive force: the significance is this: in the first place, in order to exercise his right of self-defense, the person must honestly think that he is in serious danger. That is the significance of

his frame of mind. But it isn't enough that he honestly think that he is in serious danger. His belief must be reasonable and not just caused by nervousness or by an upset state of mind or something of that sort. There must be a reasonable basis for the belief that he is in danger and, in addition, there must be an honest belief that he is in danger.

After the completion of the supplementary instructions the following colloquy took place between counsel for petitioner and the trial judge (J.A. 60–61):

Mr. BRYANT. If your Honor please, I think that you might have done it in your last remarks, but in the beginning you told the jury the defendant, in order to exercise self-defense, must actually be in real danger. Then later on, you did say he must think so. I would like for it to be told to them that if the facts are found, as a matter of fact, later on that he could not, or that he was not in danger, but at the time he thought he was by virtue of the circumstances, and that there were circumstances which were such that would allow him to draw that conclusion, then he acted——

The COURT. I do not think that I shall expand my explanation. I think my definitions were responsive to the question of the jury and I do not think I shall go beyond that question.

ARGUMENT

1. Petitioner argues (Pet. 7–10) that his statement before arraignment was inadmissible because it resulted from an undue delay in arraignment, and that the second statement to the widow of the deceased was inadmissible as "inextricably" tied to the first. We think neither contention is valid.

a. In the circumstances of this case, we do not think the delay in arraignment rendered the statement inadmissible under the rule of *Mallory* v. *United States*, 354 U.S. 449. Whether a delay is reasonable is to be determined not by a mechanical counting of the hours between arrest and preliminary hearing, but by an examination of the circumstances of the particular case. *Mallory* v. *United States*, 354 U.S. 449, 453, 455; *Williams* v. *United States*, 273 F. 2d 781, 798 (C.A. 9). In the instant case the police had probable cause for the arrest of petitioner. He had been one of those who fled when the deceased fired a shot and he had been seen in the vicinity of the slaying carrying a gun. Even while petitioner was being held, the police had found the gun and empty cartridges in his apartment (J.A. 4–5; 28–30). These were damaging coincidences and the police were entitled to conduct a reasonable pre-arraignment interrogation of petitioner in seeking some explanation about them. See *Goldsmith* v. *United States*, 277 F. 2d 335, 344 (C.A. D.C.), No. 68 Misc. O.T. 1960, certiorari denied, October 17, 1960; *Metoyer* v. *United States*, 250 F. 2d 30, 33 (C.A.D.C.).

Petitioner's decision to make a statement was made less than three hours after he was arrested and approximately one hour after Officer Chaplin began to talk with him (J.A. 34, 39). In view of the fact that a homicide had occurred this was not an unreasonable period for questioning. The delay between 3:00, when petitioner decided to speak, and 5:45, when he made his statement, was due to the efforts of the police to comply with petitioner's request to see his wife.

Since this delay was caused by petitioner himself, it cannot be imputed to the police. *United States* v. *Leviton*, 193 F. 2d 848, 855 (C.A. 2), certiorari denied, 343 U.S. 946. The fact that the police continued to question petitioner after he evidenced a willingness to make a statement does not render the statement inadmissible. The officers were only utilizing the delay engendered by petitioner himself to clear up matters surrounding the homicide. That this questioning was not prejudicial to petitioner is supported by the fact that he made no statements about the shooting during this questioning (J.A. 40).[8]

Since, in the circumstances of this case, the time that elapsed between petitioner's arrest and the making of his statement was reasonable, any delay in his arraignment following the completion of his statement did not render the statement inadmissible. See *United States* v. *Mitchell*, 322 U.S. 65, 70; *Perry* v. *United States*, 253 F. 2d 337 (C.A.D.C.), certiorari denied, 356 U.S. 941.

In any event, the proof of the pre-hearing statement resulted in no prejudice to the petitioner. See *Morse* v. *United States*, 256 F. 2d 280 (C.A. 5). When this statement was proved at the trial, the statement to the widow had already been proved.

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[8] Petitioner points to the fact that at 5:30 p.m. his request for food was denied. No invidious inference can be drawn from this denial since the reason for it was that the normal meal hour at the precinct was later in the day (J.A. 38). In any event, there is no evidence that petitioner had requested food prior to 3:00 p.m. when he decided to make his statement. Neither does petitioner contend that he had not been given a meal at the time he made his statement to Mrs. Buckson.

The statement to the police and the statement to the widow were substantially the same insofar as they described the circumstances of the shooting, and the introduction of the former statement was thus merely cumulative in effect. See *Haines* v. *United States*, 188 F. 2d 546, 550 (C.A. 9), certiorari denied, 342 U.S. 888. Moreover, since petitioner did not testify, these statements were the means by which petitioner presented his claim of self-defense to the jury and were so used in cross-examination (J.A. 44). Therefore, the fact that the same explanation had been given before aided petitioner's defense.

b. The statements to the widow were plainly admissible. The statement to Mrs. Buckson was not made at police headquarters, as was the first, but at the Municipal Court. It was made within minutes of the preliminary hearing at which the committing magistrate was required to inform petitioner of his right to remain silent (Rule 5(b), Federal Rules of Criminal Procedure). In addition, the statement was made, not to police officers, but to the widow of his victim. This statement was different in purpose and motivation from that given at the police station. It was a spontaneous act of contrition, and a natural expression of sorrow. Despite petitioner's allegations that the police of the District of Columbia have developed a practice of obtaining post-hearing statements from an accused, there is no evidence that the police induced or expected the statement which petitioner made to Mrs. Buckson. Therefore, regardless of the admissibility of the earlier statement at the police station, the statement to the widow, as a voluntary admission made while petitioner was legally

held, was admissible at petitioner's trial. See *United States* v. *Bayer,* 331 U.S. 532; *Goldsmith* v. *United States,* 277 F. 2d 335 (C.A.D.C.), No. 68 Misc., O.T. 1960, certiorari denied, October 17, 1960.

Petitioner contends (Pet. 9–10) that the decision below is in conflict with *Trilling* v. *United States,* 260 F. 2d 677 (C.A.D.C.) and *Jackson* v. *United States,* 273 F. 2d 521 (C.A.D.C.). Aside from the fact that a conflict in decisions within a circuit does not call for resolution by this Court, there is in fact no conflict. Rather, as is inevitable in this type of question, each case turns on its own facts. While a majority of the court concurred in the decision in *Trilling,* the rationale of the holding is obscured by the fact that five separate opinions were filed. Certainly that decision does not, and in the light of this Court's decision in *Bayer, supra,* could not, hold that all post-preliminary hearing statements by an accused are inadmissible because a prior inadmissible statement had been given. Nor does *Jackson.* In that case the accused made no new statement after the hearing, and did not specifically affirm the oral statement he had previously made. He merely signed a document in which the police officers had set down the statements he had made while he was being illegally detained. The instant case is clearly distinguishable because here petitioner made a new statement, to a person not a police officer, as the result of a different motivating force.

2. Petitioner's contention (Pet. 10) that the supplementary instructions misled the jurors is not supported by a reading of the full statement by the trial

judge. The jury had asked the court to "clarify or redefine" specific terms, and the supplementary instructions were properly limited to meet this request. *Apel* v. *United States,* 247 F. 2d 277, 283 (C.A. 8). Petitioner cannot show error by taking words out of context; the supplementary statement must be considered as a whole. See *Acers* v. *United States,* 164 U.S. 338, 390; *Spring Co.* v. *Edgar,* 99 U.S. 645, 659; *Patterson* v. *United States,* 192 F. 2d 631, 633 (C.A. 5), certiorari denied, 343 U.S. 951.

The court's charge on the nature of the required reasonable belief of the accused was proper and sufficient to guide the jury in determining whether petitioner had valid ground for shooting in self-defense. See *Addington* v. *United States,* 165 U.S. 184, 187; *Jackson* v. *United States,* 48 App. D.C. 272, 277. The trial court was not bound to accept the wording suggested by petitioner. See *Agnew* v. *United States,* 165 U.S. 36, 51. The trial judge had given full instructions in the main charge on the considerations involved in determining the reasonableness of petitioner's belief that he was in such peril as would justify killing in self-defense.[9] The supplementary instructions do not stand alone but must be interpreted in connection with instructions previously given. *Albizu* v. *United States,* 88 F. 2d 138, 143–144 (C.A. 1), certiorari denied *sub nom. Camps* v. *United States,* 301 U.S. 707.

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[9] Petitioner does not contend that there was any error in the main charge.

The court below properly held that there was no error in either the main charge or in the supplementary instructions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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